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80-2105

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CECIL W. CONNER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JOHN D. EPPERLY, Esquire
BROADDUS, EPPERLY & BROADDUS
106 East Main Street
Martinsville, Virginia 24112
(703-632-6341)

Counsel of record for Petitioner.

QUESTION PRESENTED

Was the delay in arrest and indicting the Petitioner Conner and the delay in arrest, indictment and trial of Conner a denial of a speedy trial under the Sixth Amendment to the Constitution of the United States or a denial of due process under the Fifth Amendment of the Constitution of the United States? The Petitioner Conner takes the position that the delay in arrest, indictment and trial constitutes denial of speedy trial under the Sixth Amendment of the Federal Constitution.

PARTIES

The parties to this case are:

Petitioner: Cecil W. Conner

Respondent: Commonwealth of Virginia

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Text

51 Virginia Law Review 7
at pages 16, 17 — 19

Constitution

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

CECIL W. CONNER,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner is aggrieved by a decision and judgment of the Circuit Court of Patrick County, Virginia, entered on the 27th day of March, 1980, and the judgment of the Supreme Court of Virginia entered on the 6th day of March, 1981, by reason of which Conner was convicted

of arson and sentenced to two years in the Penitentiary of the Commonwealth of Virginia.

The Petitioner doth apply to this Court for a Writ of Certiorari from a judgment of the Supreme Court of Virginia, and pursuant to Order Staying Execution of Judgment entered on the 30th day of March, 1981.

FACTS IN THE CASE

Petitioner was owner of a restaurant, living in Stuart, Virginia, which is a small community. He operated Tex's Drive In. One Bobby Bowman owned a restaurant in the same town. On the 5th day of November, 1974, Bowman's Restaurant was burned by two arsonists by the name of Hamm and Cochran. Hamm and Cochran were used as undercover agents for the

Patrick County Sheriff's Office for several months following the burning, and during the course of this time they confessed to the arson and implicated the Petitioner, claiming that he hired them to burn Bowman's Restaurant. This disclosure was made in 1975 or early 1976. Although Conner, the Petitioner herein, was present at all times in Stuart, Virginia, he was not arrested until the 3rd day of July, 1979, a matter of four and one-half years after the commission of the crime of arson, and three and one-half years after it became known to the officers that Hamm and Cochran implicated Conner.

Conner was not tried until March 27, 1980.

PROCEEDINGS IN THE CIRCUIT COURT OF PATRICK COUNTY, VIRGINIA, AND THE SUPREME COURT OF VIRGINIA

1. The Petitioner was charged on a warrant issued by the District Court of Patrick County, Virginia, on the 3rd day of July, 1979, with arson allegedly committed on the 4th day of November, 1974, in Patrick County, Virginia. (See Appendix A -- a photostatic copy of the original warrant served on the Petitioner)

2. The Petitioner was indicted at the January term of the Circuit Court of Patrick County, 1980, for the offense of arson.

3. The Petitioner was tried on the indictment and found guilty on a verdict of questionable form rendered in the Circuit Court of Patrick County, Virginia, on the 27th day of March, 1980, (Tr.150-151):

"THE CLERK: Ladies and gentlemen of the jury, have you arrived at a verdict? (Verdict handed to the Clerk.) This is a reading of your verdict. 'Guilty. Not less than two years. Roy Pilson, Foreman.'

THE COURT: The verdict is not quite clear to me; The verdict reads, 'Guilty. Not less than two years.' Now correct me if I'm wrong - we'll poll the jury to see if I'm right or if I'm wrong - but as I read the verdict the jury has found the defendant guilty and it's the verdict of the jury that he be confined in the penitentiary for a term of two years. Now, Mr. Clerk, poll the jury and ask them if that is their verdict.

MR. EPPERLY: May it please the Court, I'm quite familiar that the Court does this. I think that each individual should be asked what his verdict was rather than saying, 'Is that your verdict?'

THE COURT: Fine. Ask each individual what his or her verdict was.

(The jury was asked what their verdict was to which each replied, 'Guilty - two years.)

THE COURT: Mr. Epperly, does that satisfy you?

MR. EPPERLY: No, sir. It does not. I don't know what they found the defendant guilty of.

THE COURT: I'm going to rewrite the verdict - the form of the verdict. Now, Mr. Clerk, will you read this verdict back to the jury. Then I want you to poll the jury individually and see if that's their verdict.

THE CLERK: Ladies and gentlemen, listen, if you will, please, while I read this verdict. 'We, the jury, find the defendant guilty as charged and fix his punishment at two years in the penitentiary.' If Mr. Pilson will sign this as foreman of the jury.

(The jury was again polled and they agreed it was their verdict.)

(The jury was excused.)"

4. The Petitioner moved for suspension of execution on the judgment to allow a Petition for Writ of Error or Appeal to be filed in the Supreme Court of Virginia (Tr. 155-156):

"THE COURT: You have made a number of motions to set the verdict aside. Those motions will be overruled. As some of you gentlemen indicated to the jury perhaps it's just a matter of who they were going to believe. Cecil William Conner, I sentence you to serve two years in the penitentiary of the Commonwealth of Virginia, that being your punishment determined and ascertained by the jury. Now the execution of this sentence will be suspended for a length of time to give you an opportunity to apply for a writ of error for a period of 90 days to start with.

MR. EPPERLY: Yes, sir. That will be fine.

THE COURT: Now I assume that Mr. Conner is on bond?

MR. EPPERLY: He is.

THE COURT: And the amount of that bond is what?

MR. EPPERLY: Twenty thousand dollars.

THE COURT: Mr. Alexander, are you satisfied with the bond?

MR. ALEXANDER: Yes, your Honor.

THE COURT: That should be thoroughly adequate. The Defendant will remain on bond pending the application for a writ of error."

5. On the 9th day of January, 1981, the Supreme Court of Virginia denied the Petition for Appeal (App. B)

6. A Petition for Rehearing was filed pursuant to the Rules of Court by the Petitioner on the 19th day of January. (App. C)

7. On the 6th day of March, 1981,

the Motion for Rehearing was denied by the Supreme Court of Virginia. (App. D)

8. On the 12th day of March, 1981, a Motion was made to suspend execution on the Final Judgment of the Supreme Court of Virginia. (App. E)

9. An Order was entered in the Supreme Court of Virginia staying execution of its Judgment of March 6, 1981, until June 4, 1981, or until docketing of this Petition for Writ of Certiorari in this Court. (App. F) If docketed within the time specified, execution would further be suspended until the matter is disposed of by this Court.

JURISDICTION

The jurisdiction of this Court is hereby invoked pursuant to Amendment VI of the United States Constitution which reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The alleged crime was committed on the 5th day of November, 1974, and an arrest warrant was issued on the 3rd day of July, 1979. (App. A)

Virginia has a similar requirement for speedy trial which is set forth in Article 1, Section 8 of the Virginia Constitution, which provides:

"Criminal prosecutions. --That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy

> and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense."

The Supreme Court of Virginia has erroneously applied the requirement for a speedy trial by holding in Fowlkes v. Commonwealth, 218 Va. 763, 240 S.E.2d 262, that the Defendant in a criminal matter is not considered in jeopardy for the purpose of speedy trial until he is arrested and indicted. (In the Fowlkes case, however, a conviction was reversed for delay of approximately three years in trying Fowlkes.

The sole question presented for review upon this Petition for Writ of Certiorari is whether or not the Constitutional provisions for speedy trial were denied to

the Petitioner under the facts and circumstances of this case.

The Constitutional provisions are hereinbefore set out.

It is apparent from an examination of the Record that confessions had been obtained from the persons who were the chief witnesses against the Petitioner in the trial court approximately one year after the fire of November 5, 1974. (Tr. 101: Examination of Tommy Hamm):

> "Q. You gave a confession about 1975. Is that what you're saying?
>
> A. Yes, sir.
>
> Q. Wasn't it 1976?
>
> A. No. I think it was 1975. I think it was a year later. It could have been the first part of 1976.
>
> Q. You testified against Mr. Conner in 1979, did you not, last year?
>
> A. Yes, sir."

The officers involved delayed arresting the Petitioner for approximately three (3) years because the officers were using the informers as undercover agents or informers in other cases, (Tr. 105-106: Examination of A. D. Jones, State Trooper):

> "A. Well, at first I didn't begin investigating the fire. I was not called to that. This information came up in . . .
>
> MR. BROADDUS: Your Honor, I think it would be improper to talk about something that didn't have anything to do with this charge that we're trying here today and I would object.
>
> MR. ALEXANDER: The sole purpose for this is Mr. Epperly and Mr. Broaddus have made a tremendous issue of the time period and we have got to explain why this man was not charged until some five and a half years after the fire occurred.
>
> MR. BROADDUS: I think that's improper if he's going into other reasons other than the charge that's here before us.

THE COURT: Obviously now he's explaining the delay of the parties that were involved. Mr. Hamm and Mr. Cochran. Go ahead, sir.

MR. EPPERLY: We except the ruling.

BY MR. ALEXANDER:

Q. You were investigating, you said, something else when this came to light, is that correct?

A. Yes, sir.

Q. Now what I'm asking you is why the warrant was not issued against Tex Conner when you first found out about Tommy Hamm's statement?

A. When I first found out about Tommy Hamm's statement, his statement was all we had--the only thing we had--and we were investigating another case, as I say. Tommy Hamm ended up being a possible witness in the other case and we did not check on this case any more until after that case was disposed of. Because Tommy was obtaining information for us in the other case and we didn't want anybody to know it."

The following is set forth:

1. The alleged crime was committed on November 5, 1974.

2. The Petitioner's alleged implication in the crime was known to officers in 1975.

3. The Petitioner was not arrested until 1979.

4. The Petitioner was not tried until March 27, 1980.

The state of the pleadings and of the case are hereinbefore set out. The Federal question of right to speedy trial was raised at the trial of this matter on March 27, 1980, before the Circuit Court of Patrick County. (Tr.3) At Tr. 5-8, the Court says:

> "THE COURT: If I follow you gentlemen correctly, you're not concerned about the speedy trial aspect between the date of the issuing of the warrant, which you told me was July 3, 1979, and the present time. That if there's been any abnormal delay it was probably due to the illness of the defendant. What you are concerned about is the passage of time between the offense date of November 5, 1974, and the date of

the issuing of the warrant.

MR. EPPERLY: Yes, sir.

THE COURT: Without some furthur evidence as to how the defendant may have been prejudiced or put in some acute position of awkwardness by the failure of the Commonwealth. I don't know what caused the delay but Mr. Alexander said it was due to the lateness of the hour in discovering the involvement of Mr. Conner, so the motion will be denied to that. Please note the defendant's objection and exception. I think there's a case very much in point with this. I think we had that question and I'll try to find it for you. It's a Federal case very much in point and I'll try to find it for you. I'm trying to think of the case. It was a United States Supreme Court case very much in point with the delay in prosecution.

MR. EPPERLY: I believe it was decided in favor of the defendant.

THE COURT: No, sir. It was decided in favor of the plaintiff, strange as it might seem.

MR. BROADDUS: The second portion of our motion to quash the indictment is based on the fact that Mr. Conner was arrested sometime after July 3, 1979, and he was charged with violating Sec. 18.2-22, Code of Virginia.

THE COURT: 18.2-22?

MR. BROADDUS: Yes, That is the law as it is today. 18.22-22 was passed--excuse me, hold this. This is a little bit complicated for me to get together. It's a conspiracy to commit a felony. Now that section was not in existence in 1974.

MR. ALEXANDER: May I interrupt a minute? To save time I'll move to nol prosse a conspiracy.

THE COURT: I gather the Commonwealth is not interested in the conspiracy charge. Do you want to get it on the record anyway?

MR. BROADDUS: No, sir.

THE COURT: Any further discussion relating to the conspiracy?

MR. BROADDUS: Does it make any difference now that this man had a preliminary hearing over a charge that he has not been tried for?

MR. EPPERLY: Of course the indictment was returned.

THE COURT: Would it make any difference that there was a preliminary hearing on the conspiracy charge. That was not being dropped, Mr. Epperly?

MR. EPPERLY: I'm afraid not.

THE COURT: I don't see how the defendant could be prejudiced by that.

MR. EPPERLY: We're still relying on the speedy trial defense. That applies to the subject of the case."

ARGUMENT

The Petitioner was entitled to a speedy trial. See United States Constitution, Amendment VI. In the case of Fowlkes v. Commonwealth, 218 Va. 763, 240 S.E.2d 262, a delay of three years was held to nullify a conviction. While this case is based on the Virginia Constitution, the wording is precisely the same as the Sixth Amendment to the Federal Constitution.

Although Fowlkes case, cited supra, reached the proper conclusion, the wording in the Fowlkes case indicates that an indictment had to be in existence to warrant the defense of denial of speedy trial. This, in itself, is erroneous.

A case directly in point, and which is controlled in this matter is Ross v. United States, 349 Fed. 2d 210 (D.C.Cir. 1965). The Circuit Court of Appeals for the District of Columbia reversed a narcotics conviction because of seven months' delay in arresting the defendant who was at all times available for arrest (as was Conner in the instant case). The defendant had been convicted on the testimony of an undercover agent who had purchased narcotics from him. The arrest was delayed to allow the undercover agent to further unravel a web of illegal narcotics distribution.

The Court reasoned that the delay had exceeded the requirements of effective law enforcement. The Ross case conceded that enforcement of narcotics laws is sufficient justification for delaying arrest but only to a point. Unfortunately, the Ross case

does not give a precise guide. It is obvious in the instant case that Conner was not arrested for four years after his alleged implication and the crime was known to the police. This arrest was delayed for the purpose of using the informants in other cases. This delay is certainly not justified and amounts to the same thing as if his arrest and indictment had occurred in 1975 and his final trial was held in 1980, as the record shows.

See also 51 Virginia Law Review 7 at pages 16, 17, et seq.

There were no written opinions delivered concerning the conviction of Cecil W. Conner.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari

should be granted and the question of whether or not there was an unconscionable delay in arrest and indictment is indeed the same as an unconscionable delay in the trial after arrest and indictment. Should Certiorari be granted, an appendix fully stating the Petitioner's position will promptly be filed in accordance with the Rules of Court.

Respectfully submitted,

JOHN D. EPPERLY

of BROADDUS, EPPERLY
AND BROADDUS

Attorney for Petitioner

APPENDIX A

COMMONWEALTH OF VIRGINIA

COUNTY [CITY] OF PATRICK

To Wit:

ARREST WARRANT
(Rule 3A:4)

TO ANY SHERIFF, POLICE OFFICER, OR OTHER AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth forthwith to arrest Cecil Tee Cooney,

Floyd, Va.

(Name of accused, or a description by which the accused can be identified)

and to bring him (HER) before the Patrick County General Dist. Court, Stuart, Va.

(Designation of Court)

to answer a charge that he (she) committed an offense in the County (City) of Patrick on or about Nov. 28th, 19 78

as follows (Give a brief description of the offense charged): Unlawfully, unlicensedly and feloniously in the

night time, did cut down and burn a certain Restaurant, the property of Bobby E. Brown,

situated in the County of Patrick and the Town of Stuart, Va., in violation of

section 18.2-80 of the code of Va. Against the peace and dignity of the Comm. of Va.

On the basis of the sworn statement(s) of S. E. Jones, Exr. Va. State Police

the undersigned has found probable cause to believe the accused has committed the offense.

If a written complaint has been made, it is attached to the original of this warrant.

You are also commanded, in the name of the Commonwealth, to summon the following as witnesses:

Name S. E. Jones, Exr.	Address Stuart, Va.	☐
Name	Address	☐
Name	Address	☐
Name	Address	☐

Given under my hand and seal, this 3rd. day of July 19 79

J. M. Rogers (SEAL)
(Signature of Issuing Officer)

SHERIFF.
(Title of Issuing Officer)

APPENDIX A

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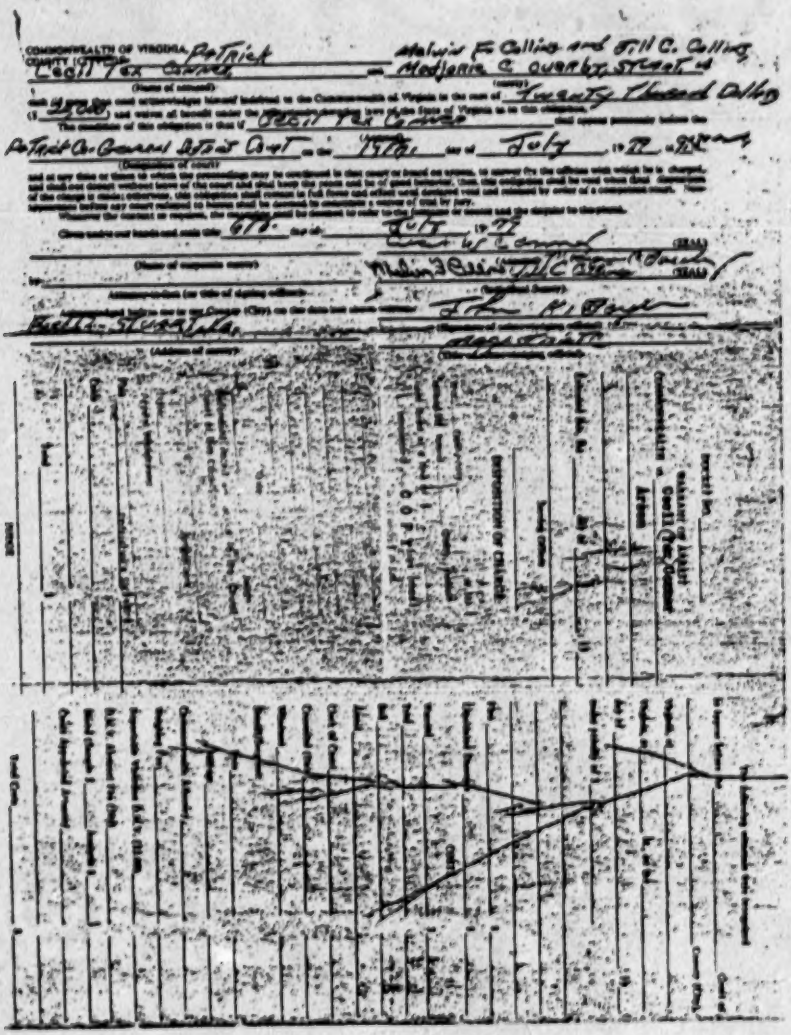

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APPENDIX B

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY, the 9th day of JANUARY, 1981.

Cecil Willie Conner, alias
Cecil Tex Conner, Appellant,

against Record No. 800968
Circuit Court No. 6439

Commonwealth of Virginia, Appellee.

From the Circuit Court of Patrick County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A copy,

Teste:
Allen L. Lucy, Clerk

By:
/s/ Richard R. Buick
Deputy Clerk

APPENDIX C

VIRGINIA: IN THE SUPREME COURT

CECIL WILLIE CONNER,	)	
	)	
Appellant	)	PETITION
	)	FOR REHEAR-
vs.	)	ING
	)	Record No.
COMMONWEALTH OF VIRGINIA,	)	800968
	)	Circuit Court
Appellee	)	of Patrick
	)	County
	)	No. 6439

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 5:29 of the Code of Virginia of 1950, as amended, the Appellant, within 14 days of the order denying the writ of error and appeal on the 9th day of January, 1981, doth hereby petition the Court for a re-hearing of this matter before the Court en banc.

The chief point to be considered by the Court, among others, is the denial of right to speedy trial as guaranteed by the Constituion of the

United States and the Constituion of Virginia.

This 19th day of January, 1981.

CECIL WILLIE CONNER

By /s/ John D. Epperly
Counsel

John D. Epperly, p.q.
Broaddus, Epperly and Broaddus
106 E. Main Street
Martinsville, Virginia 24112

C E R T I F I C A T E

This certificate pursuant to Rule 5:22 of the Code of Virginia: The name of the Appellant is Cecil Willie Conner of Stuart, Virginia; the name of the Appellee is the Commonwealth of Virginia, who is represented by William N. Alexander, Commonwealth's Attorney for Franklin County, Virginia, he having been designated to prosecute this charged whose address is 110 Maple Avenue, Rocky Mount, Virginia 24151;

The name and address of counsel for the Appellant is John D. Epperly, Broaddus, Epperly and Broaddus, 106 E. Main Street, P. O. Box 1031, Martinsville, Virginia 24112.

The date of the mailing of this petition to the Supreme Court of Virginia with 8 copies thereof, being sent to the Clerk of the Supreme Court of Virginia, a copy being sent to David G. Hanby, Clerk of the Circuit Court of Patrick County, Virginia, and a copy to William N. Alexander, Commonwealth's Attorney Designate, Rocky Mount, Virginia, this 19th day of January, 1981.

This will further certify that the undersigned is a member of the Bar of Virginia and qualified before this Court and doth verily believe that the appeal should be granted.

This 19th day of January, 1981.

/s/ John D. Epperly

APPENDIX D

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 6th DAY OF MARCH, 1981.

Cecil Willie Conner, alias
Cecil Tex Conner, Appellant,

against Record No. 800968
Circuit Court No. 6439

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of January, 1981, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ Allen L. Lucy
Clerk

APPENDIX E

VIRGINIA: IN THE SUPREME COURT

CECIL WILLIE CONNER, alias CECIL TEX CONNER, Appellant	
vs.	MOTION Record No. 800968
COMMONWEALTH OF VIRGINIA, Appellee	Circuit Court No. 6439

The Appellant doth hereby move the Court that execution in the judgment rendered on the 19th day of January, 1981, upon which a Petition for rehearing was denied be suspended pending application to the Supreme Court of the United States for a Writ of Certiorari for the statutory period of 90 days.

The Appellant further prays that an Order of suspension be directed to the Circuit Court of Patrick County.

CECIL W. CONNER

By /s/ John D. Epperly
Counsel

John D. Epperly
Broaddus, Epperly & Broaddus
106 E. Main Street
Martinsville, Va. 24112

C E R T I F I C A T E

This is to certify that I have this 12th day of March, 1981, mailed a true copy of the foregoing Motion to D. G.

Hanby, Clerk of the Circuit Court of Patrick County, Stuart, Virginia 24171, Honorable John D. Hooker, Judge, Circuit Court of Patrick County, Stuart, Virginia 24171, and to William N. Alexander, Commonwealth Attorney Designate, Rocky Mount, Virginia 24151.

/s/ John D. Epperly